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No. 98-384

In The Supreme Court Of The United States

October Term, 1997

FILED

NOV 2 - 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

NORTHERN STATES POWER COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

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53 pp

QUESTIONS PRESENTED

1. Whether the court of appeals has the jurisdiction to issue a mandamus to enforce the Nuclear Waste Policy Act of 1982 and to preserve the integrity of its prior, unappealed decision in *Indiana Michigan Power Co. v Dep't. of Energy*, 88 F.3d 1272 (D.C. Cir., 1996) that held the Department of Energy ("DOE") has an unconditional obligation to take spent nuclear fuel by January 31, 1998.

2. Whether the court of appeals' decision below should be reviewed, not for the reasons stated in DOE's petition, but rather for the reasons stated in the petition filed by State Respondents in *State of Michigan, et al. v United States Dep't of Energy, et al.*, No. 98-225.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

INDEX OF AUTHORITIES iv

STATEMENT 1

ARGUMENT 10

I. DOE ERRONEOUSLY PORTRAYS THIS CASE AS AN ACTION FOR DAMAGES SUBJECT SOLELY TO COURT OF FEDERAL CLAIMS JURISDICTION UNDER THE TUCKER ACT, DESPITE THE FACT THAT RESPONDENTS' PETITIONS WERE TO ENFORCE THE NWPA UNDER THE ORIGINAL AND EXCLUSIVE JURISDICTION OF THE COURT OF APPEALS 10

II. THE COURT OF APPEALS PROPERLY ISSUED A MANDAMUS TO ENFORCE THE NWPA AND TO PRESERVE THE INTEGRITY OF ITS PRIOR DECISION 13

III. THE COURT OF APPEALS HAD THE AUTHORITY TO ISSUE A MANDAMUS UNDER NWPA §119 AND THE ALL WRITS ACT 18

IV. THE COURT OF APPEALS' MANDAMUS DOES NOT INTERFERE WITH THE STANDARD CONTRACT 20

V. DOE'S THEORY THAT THE STANDARD CONTRACT DELAYS CLAUSE WAS NOT CHALLENGED ON A TIMELY BASIS IS WITHOUT MERIT 21

VI. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED, NOT FOR THE REASONS SET FORTH IN DOE'S PETITION, BUT RATHER FOR THE REASONS SET FORTH IN THE PETITION FILED BY STATE RESPONDENTS IN *STATE OF MICHIGAN, ET AL. v. UNITED STATES DEP'T OF ENERGY, ET AL.*, NO. 98-225 25

CONCLUSION 29

INDEX OF AUTHORITIES

CASES

Chevron USA, Inc. v Natural Resources Defense Council, Inc.,
467 U.S. 837; 104 S. Ct. 2778;
81 L. Ed. 2d 694 (1984) 24

Comm'r of IRS v Schleier,
515 U.S. ___; 115 S. Ct. 2159;
132 L. Ed. 2d 294 (1995) 16

Commonwealth Edison Co v United States Dep't of Energy,
877 F.2d 1042 (D.C. Cir. 1989) 16

Indiana Michigan Power Co. v Dep't. of Energy,
88 F.3d 1272 (D.C. Cir., 1996) ..... 4, *passim*

Louisiana Public Service Comm. v FCC,
476 U.S. 355 (1986) 17

Northern States Power Company v Department of Energy, 128 F.3d 754 (D.C. Cir. 1997) .... 6, *passim*

Pan American Petroleum Corp. v Superior Court,
366 U.S. 656 (1961) 12

State of Idaho v Dep't of Energy,
945 F.2d 295 (9th Cir., 1991) 9

The Fair v Kohler Die & Specialty Co.,
228 U.S. 22 (1913) 12

Zobrest v Catalina Foothills School Dist.,
509 U.S. 1 (1993) 24

STATUTES AND REGULATIONS

Administrative Procedures Act,
5 U.S.C. §706(1) 6

All Writs Act,
28 U.S.C. §1651(a) 6, 18-19

Declaratory Judgment Act,
28 U.S.C. §2201 6

Notice of Inquiry on Waste Acceptance Issues,
59 Fed. Reg. 27,007 (May 25, 1994) 3-4

Nuclear Waste Policy Act of 1982 ("NWPA"),
42 U.S.C. §§10101 *et seq.* ..... 1, *passim*
§111, 42 U.S.C. § 10131 23
§111(b)(1), 42 U.S.C. §10131(b)(1) 23
§111(b)(2), 42 U.S.C. §10131(b)(2) 23
§119, 42 U.S.C. §10139 ..... 2, *passim*
§119(a), 42 U.S.C. §10139(a) 10
§119(a)(1)(A), 42 U.S.C. §10139(a)(1)(A) .. 4
§119(a)(1)(B), 42 U.S.C. §10139(a)(1)(B) ... 8
§119(c), 42 U.S.C. §10139(c) 24
§302(a)(5)(B), 42 U.S.C. §10222(a)(5)(B) ...1, *passim*

MISCELLANEOUS

H.R. Rep. No. 491, 97th Cong., 2nd Sess., pt. 1, (1982)
p. 28, 1982 U.S.C.C.A.N. 3794..... 28
p. 29, 1982 U.S.C.C.A.N. 3795..... 27-28
p. 30, 1982 U.S.C.C.A.N. 3796..... 26

48 Fed Reg. (1983)
p. 16,596 22

59 Fed. Reg. (1994)
p. 22,829-22,835..... 9
p. 27,007 3

60 Fed. Reg. (1995)
p. 21,793..... 3
p. 21,797..... 1

STATEMENT

The State Respondents[1] file this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed by the United States of America, the United States Department of Energy, and the Secretary of Energy (collectively, "DOE").

1. DOE's Statement fails to accurately describe the origins of this controversy or how the DOE has consistently sought to evade its duties under the Nuclear Waste Policy Act of 1982 ("NWPA"), 42 U.S.C. §§10101 *et seq.*, and avoid any liability for its actions or failures to act.

2. From 1982, when the NWPA was enacted, until 1993, the DOE repeatedly advised Congress and others that the January 31, 1998 deadline for accepting high level radioactive waste/spent nuclear fuel ("SNF") was achievable and that NWPA §302(a)(5)(B), [42 U.S.C. §10222(a)(5)(B)], required nothing less.[2] The

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[1]The State Respondents are comprised of States, State Utility Regulatory Commissions, Municipal Utilities, and national associations, who were Petitioners below in court of appeals No. 97-1065.

[2]See, e.g., September 7, 1984 letter of Department of Energy Secretary Donald P. Hodel to Senator Bennett Johnston ("the overall thrust of the Act, will create an obligation for the Department to accept spent fuel in 1998 whether or not a repository is in operation"). Reprinted in part at 60 Fed. Reg. 21,797 (1995); *also see* December 17, 1992 letter of Department of Energy Secretary James D. Watkins to Senator Bennett Johnston ("I believe this new strategy for the Department and Congress will

States, the utilities operating nuclear plants and the public relied upon the DOE's repeated assurances that it would, after decades of federal failure, begin to accept the SNF by January 31, 1998. Based on these assurances, the utilities and the millions of ratepayers nationwide, whom the State Respondents represent, poured billions of dollars[3] into the Nuclear Waste Fund in full compliance with the NWPA and with the full expectation that DOE would begin taking SNF by the statutory deadline of January 31, 1998.

3. In November, 1993, regulatory officials and utility executives from Michigan, Minnesota and Florida wrote to then DOE Secretary Hazel O'Leary, asking whether the DOE would be able to comply with the January 31, 1998 deadline for accepting SNF as required by NWPA §302(a)(5)(B). Secretary O'Leary thereafter responded that the DOE did not have a legal obligation under the NWPA to accept SNF absent an operational repository.

4. In June, 1994, within 180 days after being advised of this new DOE position, the State Respondents and Utility Respondents filed, pursuant to the NWPA §119, Petitions for Review of the DOE's

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produce the results needed to begin SNF receipt in 1998"). A copy of Admiral Watkins' letter was included as Attachment F to the State Respondents' Petition for a Writ of Mandamus in No. 97-1065.

[3]The contributions to the Nuclear Waste Fund, including both payments and interest, totaled approximately $13.1 billion as of December 31, 1996. A compilation of payments, by state, to the Nuclear Waste Fund, was included as Attachment A to the Joint Reply of State Petitioners in No. 97-1065. It is estimated that the total now exceeds $15 billion.

determinations with the U.S. Court of Appeals for the District of Columbia Circuit. The Utilities' petition and States' petition were docketed as No. 94-1457 and 94-1458, respectively.[4] The State Respondents' petition requested, *inter alia*, a declaratory judgment reversing DOE's determination, an order directing DOE to develop a plan to allow it to accept SNF by January 31, 1998 along with a 6 month reporting requirement for DOE to describe its progress, and the escrowing of payments into an external trust fund.

5. Shortly before the filing of the Utility and State petitions, the DOE issued a Notice of Inquiry on Waste Acceptance Issues, 59 Fed. Reg. 27,007 (1994) which reiterated its earlier-stated position, but characterized it as a preliminary finding, and initiated a proceeding to receive comments on that position. Nearly one year later, after receiving comments from over a thousand parties, DOE issued its "Final Interpretation on Nuclear Waste Acceptance Issues under the Nuclear Waste Policy Act of 1982" ("Final Interpretation") 60 Fed. Reg. 21,793 (1995). In that decision, the DOE determined that under the NWPA its obligation to accept SNF by January 31, 1998 was conditioned upon the existence of operational disposal facilities. The State and Utility Respondents again filed petitions with the court of appeals to review DOE's Final Interpretation. The Utilities' petition was docketed as No. 95-1279 and the States' petition was docketed as No. 95-1321. The State Respondents'

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[4]DOE filed a Motion to Dismiss the petitions in 94-1457 and 94-1458 arguing that the DOE's response did not constitute final agency action.

petition in No. 95-1321 sought the same relief as their earlier petition in 94-1458.

6. In *Indiana Michigan v Department of* Energy, 88 F.3d 1272 (D.C. Cir. 1996), the court of appeals in Nos. 95-1279 and 95-1321[5] reversed and vacated the DOE's Final Interpretation, stating:

> In (B) [NWPA §302(a)(5)(B)], Congress . . . directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duty under (B) is that that duty is "in return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress.

Pet. App. 36a. The court of appeals concluded:

> Under the plain language of the statute, the utilities anticipated fees "in return for [which] the Secretary" had a commensurate duty. She was to begin

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[5]On July 28, 1995, the court of appeals dismissed the earlier filed petitions in Nos. 94-1457 and 94-1458, finding that DOE's Notice of Inquiry did not constitute final agency action and therefore the court was without jurisdiction under NWPA §119(a)(1)(A).

> disposing of the high level radioactive waste or SNF by a *day certain*. The Secretary now contends that the payment of fees was for nothing. At oral argument, one of the panel compared the government's position to a Yiddish saying: "Here is air; give me money," and asked counsel for the Department to distinguish the Secretary's position. He found no way to do so, nor have we.

Pet. App. 36a. (emphasis added). The court of appeals then remanded the matter to DOE.

7. In the four months following *Indiana Michigan*, DOE did not seek rehearing and did not seek this Court's review. In fact, the DOE did nothing. The State Respondents then wrote DOE asking what it was doing to comply with *Indiana Michigan*. The DOE responded that it would not be able to comply with its unconditional obligation to begin taking SNF by January 31, 1998. It then solicited comments how its delay could be accommodated. Thereafter, the DOE commenced an administrative proceeding in which it found that its delay in complying with the January 31, 1998 deadline (set by the NWPA 15 years earlier) had been unavoidable.

8. On January 31, 1997, the Utility and State Respondents returned to the court of appeals, each filing petitions which were docketed as Nos. 97-1064 and 97-1065, respectively. Invoking the Court's

jurisdiction under Section 119 of the NWPA, 42 U.S.C. §10139, Administrative Procedures Act, 5 U.S.C. § 706(1), Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. §1651(a), the State Respondents requested the same relief as in their previous petitions in Nos. 94-1458 and 95-1321 and added the request for an order of mandamus.

9. The court of appeals ordered that the petitions be refiled as mandamus petitions in conformity with D.C. Cir. Rule 21(a). Thereafter, in *Northern States Power Company v Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997), the Court held:

> [W]e do not grant petitioners' broad request for a writ of mandamus because we conclude that the remedial scheme of the Standard Contract offers a potentially adequate remedy. We do, however, grant the petition in part because DOE has not abided by our prior conclusion that the NWPA imposes an unconditional obligation on the Department to begin disposal of the SNF by January 31, 1998. We therefore issue a writ of mandamus precluding DOE from excusing its own delay on the grounds that it has not yet prepared a permanent repository or interim storage facility. We retain jurisdiction over this case pending compliance with the mandate issued herewith.

Pet. App. 14a.

10. DOE and Yankee Atomic Power Company each filed Petitions for Rehearing of the *Northern States* decision. DOE's rehearing petition *inter alia*, stated that it was considering using Nuclear Waste Fund monies to pay for damages caused by its failure to begin to accept SNF by January 31, 1998.

11. In accordance with the Court's retained jurisdiction, the State Respondents and Utility Respondents then filed motions seeking further enforcement including an order barring DOE from forcing the utilities and their ratepayers to fund their own damages due to DOE's failure to act. The State Petitioners' motion sought the same relief requested in earlier petitions, but because of DOE's continued efforts to circumvent its unconditional obligation under the NWPA to take SNF by January 31, 1998, the State Petitioners also asked for the appointment of a Special Master to monitor DOE's compliance.

12. In an unpublished order issued May 5, 1998, the court of appeals denied both Rehearing Petitions and the Motions filed by State and Utility Respondents. Pet. App. 15a-19a. The order starkly conflicts with the earlier decisions in *Indiana Michigan* and *Northern States* by finding that while Congress created an unconditional obligation for DOE to take SNF, Congress did not require performance of that obligation:

> While the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the

> DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order.

Pet. App. 18a. Subsequently, in an order dated July 2, 1998, the court of appeals terminated its continuing jurisdiction over the matter, and dismissed all pending cases. Pet. App. 23a.

13. On August 3, 1998, the State Respondents filed their own petition for a writ of certiorari seeking review of the court of appeals' May 5, 1998 determination that the NWPA did not impose an enforceable statutory duty on DOE to take SNF by January 31, 1998 and the court of appeals' failure to exercise its jurisdiction under NWPA §119 to remedy DOE's refusal to comply with its statutory duty (including the court of appeals' July 2, 1998 dismissal orders). That petition has been docketed as *State of Michigan, et al. v United States Dep't of Energy, et al.*, No. 98-225.

14. The court of appeals' May 5, 1998 order has also spawned a multiplicity of lawsuits. Eleven utilities have filed separate actions for damages in the Court of Federal Claims. Five utilities have jointly filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit in *Consolidated Edison Co. of New York, et al v U.S. Dep't of Energy*, No. 98-1358 and have

invoked that court's original and exclusive jurisdiction under NWPA §119 to review certain DOE actions.

15. The direct consequence of the court of appeals determination is that there is no binding plan or enforceable, date-certain schedule as to when DOE will begin to accept SNF, even though DOE has the capability to accept SNF.[6] Nevertheless, DOE contends that Respondents remain obligated to pay additional billions of dollars into the Nuclear Waste Fund despite DOE's continuing failure to comply with NWPA §302(a)(5)(B).

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[6]DOE has amply demonstrated the capability to accept SNF. DOE currently transports, accepts and stores SNF from 41 foreign countries and certain domestic sources. See, "Finding of No Significant Impact for the Urgent-Relief Acceptance of Foreign Research Reactor Spent Nuclear Fuel," 59 Fed. Reg. 22,829-22,835 (1994). Also, at oral argument in *Northern States*, counsel for DOE admitted that it is physically possible for the DOE to accept SNF and acknowledged that the DOE in arguments before the Ninth Circuit stated that it had plenary authority under the Atomic Energy Act to store SNF from a commercial reactor at a DOE facility. See, *Northern States Power Co., et al., v Dep't of Energy, et al.*, No. 97-1064, transcript of proceedings, pp.29-36 (September 25, 1997); see also, DOE Brief, pp.25-28 (dated August 5, 1991) in *State of Idaho v Dep't of Energy*, No. 91-70094, 945 F.2d 295 (9th Cir., 1991), attached as Exhibit 1 to Utility Petitioners' Reply in Support of Petition for a Writ of Mandamus in 97-1064.

ARGUMENT

I. DOE ERRONEOUSLY PORTRAYS THIS CASE AS AN ACTION FOR DAMAGES SUBJECT SOLELY TO COURT OF FEDERAL CLAIMS JURISDICTION UNDER THE TUCKER ACT, DESPITE THE FACT THAT RESPONDENTS' PETITIONS WERE TO ENFORCE THE NWPA UNDER THE ORIGINAL AND EXCLUSIVE JURISDICTION OF THE COURT OF APPEALS.

Throughout its petition, DOE portrays this litigation as involving a contractual claim under the Standard Contract, which DOE then claims is subject to the exclusive jurisdiction of the Court of Federal Claims. However, the State Respondents invoked the court of appeals' original and exclusive jurisdiction under NWPA §119[7] and related statutes. In short, neither the Utility nor State Respondents' petitions in the court of appeals ever involved an action for damages or any other contractual claim subject to the Tucker Act.

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[7]NWPA, §119(a) is unequivocal in granting the court of appeals' "original and exclusive jurisdiction over any civil action -- (A)for review of any final decision or action of the Secretary ... (B)alleging the failure of the Secretary ... to make any decision, or take any action, required under this subtitle ... (C)challenging ... any decision made, or action taken ... Section 119(b) in setting the time for filing any action, refers to "the date of the decision or action or failure to act involved...". This statutory provision evidences the concern of Congress for DOE to perform and to do so on a timely basis.

The Utility and State Respondents initially sought review in the court of appeals, in accordance with NWPA §119, within 180 days of DOE's first pronouncements in 1993 and 1994 of its newly minted interpretation that its statutory obligation to take SNF by January 31, 1998 was conditional and thus wholly deferrable. The Respondents also sought timely review of DOE's Final Interpretation.[8]

Following *Indiana Michigan*, DOE did not undertake any action to comply with that court's decision and remand. Instead, DOE persisted in its attempt to treat this case as involving a request for contractual remedies. The Utility and State Respondents returned to the court of appeals with subsequent petitions, pursuant to NWPA §119 and related statutes, to seek enforcement of the decision and mandate in *Indiana Michigan* and the NWPA.

In its ensuing decision in *Northern States*, the court of appeals again held that the NWPA imposed upon the DOE an unconditional obligation to begin disposal of SNF, beginning not later than January 31, 1998. In *Northern States*, the court exhaustively reviewed the history of this litigation, and clearly continued to adhere to the finding that "Congress ... dictated ... the deadline by which DOE must begin disposing of the SNF." Pet. App. 3a. While the court of appeals did not grant the broad mandamus and other relief requested by the State Respondents, it did grant a

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[8]DOE's Final Interpretation as described in DOE's Petition, p.8, also stated that if the obligation to accept SNF no later than January 31, 1998 was unconditional, that the Delays Clause of the Standard Contract would supply the appropriate remedy.

Limited Mandamus to enforce DOE's statutory duty, finding that this statutory duty was not subservient to DOE's interpretation of the Standard Contract.

The gist of DOE's Petition is a revisionist one -- that Respondents' actions in this litigation involved contractual claims -- when in fact Respondents' actions always involved statutory claims, or otherwise have sought to enforce the NWPA or the court of appeals' decisions. As this Court has noted, "the party who brings a suit is master to decide what law he will rely upon." *Pan American Petroleum Corp. v Superior Court*, 366 U.S. 656, 662 (1961) (citing *The Fair v Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913)). Thus, the DOE cannot transform this case into a contract action for damages when the State Respondents' actions have always involved solely statutory claims. Although State Respondents believe the court of appeals erred seriously in confining its mandate to the Limited Mandamus, the court of appeals was nonetheless clearly within its jurisdiction and authority to enforce its prior decision.[9]

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[9]Because the State Respondents believe the court of appeals below erred, not for the reasons alleged by DOE, but rather for the reasons alleged by the State Respondents, this Court should grant review. See Argument VI, *infra*.

II. THE COURT OF APPEALS PROPERLY ISSUED A MANDAMUS TO ENFORCE THE NWPA AND TO PRESERVE THE INTEGRITY OF ITS PRIOR DECISION.

Contrary to DOE's arguments, the court of appeals has the jurisdiction and authority to issue a writ of mandamus to enforce the NWPA and preserve the integrity of its prior decision in *Indiana Michigan*. As the court of appeals noted in *Northern States* (Pet. App. 13a), DOE has consistently attempted to find ways to avoid complying with the NWPA's January 31, 1998 deadline:

> Given DOE's repeated attempts to excuse its delay on the ground that it lacks an operational repository or interim storage facility, we find it appropriate to issue a writ of mandamus to correct the Department's misapprehension of our prior ruling. Accordingly, we order DOE to proceed with contractual remedies in a manner consistent with NWPA's command that it undertake an unconditional obligation to begin disposal of the SNF by January 31, 1998. More specifically, we preclude DOE from concluding that its delay is unavoidable on the ground that it has not yet prepared a permanent repository or that it has no authority to provide storage in the interim.

The court of appeals plainly stated that it was issuing its Mandamus to prevent the DOE from continuing to use an argument that that court had *already* rejected:

> Put another way, DOE's position is that its delayed performance is unavoidable because it does not have an operational repository, and does not have the authority to provide storage in the interim. DOE is simply recycling the arguments rejected by this court in *Indiana Michigan*. DOE unsuccessfully argued in that case that it does not have an obligation to take the SNF in the absence of an operational repository or other facility; here, DOE recycles that same argument in the slightly different form that it does not have responsibility for the costs resulting from its failure to perform that duty because it does not have an operational repository or other facility. As we pointed out in *Indiana Michigan*, the NWPA directs DOE to undertake the duty to begin taking the SNF by January 31, 1998, whether or not it has a repository or interim storage facility. DOE cannot now render its obligation contingent, and free itself of the costs caused by its delay, by advancing the same failed position that we rejected before.

Pet. App. 12a-13a. Furthermore, as the court of appeals noted, if the DOE were allowed to recycle its argument on remand, it would be using the contract to defeat the statute:

> We held in *Indiana Michigan* that the NWPA imposes an unconditional duty on DOE to take the materials by 1998. Congress, in other words, directed DOE to assume an unqualified obligation to take the materials by the statutory deadline. Under the Department's interpretation of the governing contractual provisions, however, the government can always absolve itself from bearing the costs of its delay if the delay is caused by the government's own acts. This cannot be a valid interpretation, as it would allow the Executive Branch to void an unequivocal obligation imposed by Congress. DOE has no authority to adopt a contract that violates the directives of Congress, just as it cannot implement interpretations of the contract that contravene this court's prior ruling. We hold that this provision in the Standard Contract, insofar as it is applied to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty.

Pet. App. 13a-14a. The court of appeals thus clearly issued its mandamus specifically to enforce the NWPA and to protect the integrity of its prior decision in *Indiana Michigan*.

Despite these clear explanatory statements by the court of appeals, the DOE has sought to invent a conflict between two federal courts where none exists. DOE argues that since the words "avoidable" and "unavoidable" appear only in the Standard Contract, this case goes directly, and exclusively, to the manner in which the Standard Contract is construed and its remedial provisions implemented. Pet.16. The DOE's argument that the court of appeals has impermissibly intruded upon the jurisdiction of the Court of Federal Claims misses the point. This argument may be rejected for at least two reasons.

First, the DOE cannot seriously contend that the Standard Contract takes precedence over the statute. The issue in *Northern States* was not how the words "avoidable" or "unavoidable" were to be construed, but rather, whether the DOE's actions on remand from *Indiana Michigan* were consistent with the NWPA's command for an unconditional DOE obligation. The DOE cannot circumvent the plain language of a statute by relying on its own regulation[10] interpreting that statute. *Comm'r of IRS v Schleier*, 515 U.S. ___; 115 S. Ct. 2159; 132 L. Ed. 2d 294, 304-305 (1995). *See also,*

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[10]In *Commonwealth Edison Co v United States Dep't of Energy*, 877 F.2d 1042 (D.C. Cir. 1989), the U.S. Court of Appeals for the District of Columbia Circuit held that the Standard Contract was far more akin to a regulation in the manner and procedure by which it was adopted.

Louisiana Public Service Comm. v FCC, 476 U.S. 355, 374-375 (1986). Congress intended that the Standard Contract with utilities be used as a vehicle to *guarantee* performance by January 31, 1998. Indeed, this is the hallmark of the NWPA - that there be a definite deadline for DOE performance in return for the billions of dollars paid by utilities and their ratepayers. Instead, DOE interprets the Standard Contract to excuse its failure to take SNF by the January 31, 1998 deadline set by Congress in NWPA §302(a)(5)(B). In short, once the DOE's "conditional obligation" argument was specifically rejected by the court of appeals in *Indiana Michigan*, the DOE could not then commence an administrative proceeding under the Standard Contract to excuse its "unconditional obligation" on the basis that the DOE does not have an operational repository or other interim storage.

Second, DOE's argument does not relate directly to the roots of *Northern States*, which was commenced to enforce the statute and the ruling in *Indiana Michigan*. The "avoidable" or "unavoidable" issues did not really exist until the DOE itself placed it at issue in response to the court of appeals' remand. Rather than making a good-faith effort to take steps to meet Congress' mandate in the NWPA that DOE begin to accept SNF by the January 31, 1998 deadline, the DOE has instead sought to use the contract argument to insulate it from the force and effect of *Indiana Michigan* which found that DOE's obligation to take SNF by the January 31, 1998 deadline was unconditional. Thus, DOE's contractual arguments are simply erroneous and irrelevant since the court of appeals in *Northern States* properly issued a mandamus to enforce the statute and

preserve its prior decision and mandate in *Indiana Michigan*.

III. THE COURT OF APPEALS HAD THE AUTHORITY TO ISSUE A MANDAMUS UNDER NWPA §119 AND THE ALL WRITS ACT.

DOE argues that the Mandamus is contrary to the All Writs Act, 28 U.S.C. §1651(a), because there is no prospect that the court of appeals will be called upon to resolve any future dispute that may arise concerning the proper interpretation of the Delays Clause of the Standard Contract. Pet.18.

DOE once again misstates the issue. As noted, the issue in *Northern States* was whether DOE's actions violated the plain language of the NWPA's mandate and contravened the court of appeals' remand in *Indiana Michigan*. The words "avoidable" or "unavoidable" were neither construed nor at issue in *Indiana Michigan*. Furthermore, the DOE's reading of the All Writs Act is erroneously selective. That Act [28 U.S.C. §1651(a)] provides that mandamus is appropriately issued when the case that it affects is:

> one that may lie within the prospective future jurisdiction of the Court of Appeals, *or that has in fact come within its jurisdiction in the past*. (emphasis added).

The question whether *DOE* had an unconditional obligation under NWPA §302(a)(5)(B) to take SNF by January 31, 1998 was squarely before the court of appeals in *Indiana Michigan* when it reviewed DOE's Final Interpretation. DOE neither challenged the court of appeals' jurisdiction to review the DOE's actions in *Indiana Michigan* nor did it appeal or seek rehearing of the same. Thus, it is incontrovertible that the case had, in fact, come within the court of appeals' jurisdiction in the past.

DOE is also incorrect in stating that "There . . . is no prospect that the D.C. Circuit will be called upon to resolve any future dispute that may arise concerning . . . the Standard Contract." Pet.19. As noted, this litigation arose under the statute, pursuant to NWPA § 119, and *not* under the Standard Contract. Moreover, it is likely that any future disputes will arise under the statute, including disputes flowing from this litigation. Quite simply, the court of appeals in this case, by directly enforcing the statute and its mandate in *Indiana Michigan*, was not acting pursuant to the Standard Contract, but was exercising its own "original and exclusive" jurisdiction under NWPA §119 and the All Writs Act and therefore was not intruding upon the jurisdiction of the Court of Federal Claims.[11] Thus, the court of appeals had the jurisdiction and authority to issue the Limited Mandamus.

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[11] For the same reason, the DOE's analogy to *FCC v Iowa* Utilities *Board, et al*, No. 97-1519, is neither applicable nor relevant.

IV. THE COURT OF APPEALS' MANDAMUS DOES NOT INTERFERE WITH THE STANDARD CONTRACT.

DOE argues that the court of appeals' "apparent premise" was that DOE's failure to fulfill a contractual obligation "necessarily" requires the payment of damages for any losses incurred as a result of the breach. Pet. 20. DOE then argues that this "apparent premise" has no basis in the law of contracts and further that it threatens the very doctrine of *"force majeure." Id.* However, DOE's exponential leap in both logic and the degree of the error alleged is not based on an accurate or reasonable reading of what the court of appeals actually decided in *Northern States.*

Northern States was based on two considerations. The first was Congress' command in NWPA §302(a)(5)(B) that DOE's obligation to take SNF by January 31, 1998 is unconditional. The second was the court's remand in *Indiana Michigan* requiring DOE to undertake further actions consistent with that Congressional mandate. Consistent with those considerations, the court of appeals correctly viewed DOE's actions on remand from *Indiana Michigan* as nothing more than a transparent attempt to defy both the NWPA and the *Indiana Michigan* remand order. Thus, the "apparent premise" that DOE attributes to the court of appeals formed no basis for that court's Limited Mandamus.

Moreover, DOE erroneously engages in a belated, post-remand attempt to elevate the position of the Standard Contract's Delays Clause including "acts

of Government in either its sovereign or contractual capacity" into a legitimate *"force majeure"* situation authorizing limitless discretion to DOE to delay performance and to defy the statute and the court's rulings. DOE would use this phrase to destroy the statutory deadline, and the essential *"quid pro quo"* of the entire statute. The court of appeals correctly enforced the entire statute and its prior ruling by preventing DOE from using this phrase to override the unconditional nature of statute and to absolve itself from any potential consequences arising from its non-compliance.

V. DOE'S THEORY THAT THE STANDARD CONTRACT DELAYS CLAUSE WAS NOT CHALLENGED ON A TIMELY BASIS IS WITHOUT MERIT.

The DOE argues that the court of appeals' disposition of the case in *Northern States* may be due to an alternative explanation - that the unavoidable delays provision is, on its face, inconsistent with the NWPA. Pet. 23. The DOE concludes that since the Delays Clause of the Standard Contract was promulgated in 1983, the only time that its terms could be challenged was when it was promulgated. Since that time had long since passed when *Indiana Michigan* was commenced, DOE contends that the terms of the Standard Contract cannot be challenged. This argument is without merit for a number of reasons.

First, DOE's argument contains either a large measure of revisionist history or a perception conveniently unfettered by the facts. As previously

noted herein, at the time the NWPA was enacted and for a decade thereafter (including the time during which the Standard Contract was promulgated) the DOE repeatedly stated that NWPA §302(a)(5)(B) legally required it to begin to accept SNF by the January 31, 1998 deadline and that it would comply with that requirement. Thus, there was never any prior expectation that DOE would fail to begin accepting SNF by the statutorily mandated deadline. Furthermore, there was no basis to conclude that the Delays Clause would apply to the statutory command that DOE was required to accept SNF by January 31, 1998.[12] Moreover, all parties reasonably relied on

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[12] Any challenge of the Standard Contract's delay provision within 180 days of its promulgation no doubt would have been met with a motion to dismiss by DOE on the basis of lack of case or controversy, or lack of ripeness, since DOE then urged that it was required to perform by 1998. Indeed, contemporaneous with promulgation of the Standard Contract, DOE's Sectional Analysis of the Contract, 48 Fed. Reg. 16,596 (1983) stated:

> Similarly, seven commenters addressed the question of DOE performance standards and Purchaser remedies with respect to performance. In essence, these commenters pointed out that no date exists other than the January 31, 1998 date to evaluate DOE's program performance. If that date is not met, these commenters say, the contract provides no specific remedies against DOE for failing to meet the date. DOE has considered this comment and the suggestion that suitable language be included in the contract, but it has decided not to adopt the recommended modification. We recognize that these issues are of concern to the utilities. However, we believe that we should be consistent with the language of the Act. *The 1998 date is called for in the Act, and we believe it to be a realistic date. Our performance will be judged by meeting this date.* If the intent of the Act was to have intermediate

DOE's own repeated interpretation of, and commitment to, the 1998 deadline until the time DOE indicated a reversal of its prior interpretation, first in the letter exchanges in late 1993 and early 1994, followed by the DOE comment proceeding culminating with the Final Interpretation. State and Utility Respondents commenced litigation against these DOE interpretations within 180 days of either of these events.[13]

Second, in addition to the plain language of NWPA §302(a)(5)(B), the findings and purposes section of NWPA, §111 (42 U.S.C. §10131) rules out any suggestion that NWPA could be interpreted as authorizing the promulgation of a regulation that would compromise Congress' January 31, 1998 deadline in NWPA §302(a)(5)(B). Clearly, such a regulation would undermine Congress' stated purposes in establishing a schedule, NWPA §111(b)(1), in establishing Federal responsibility, NWPA §111(b)(2), and in establishing a definite Federal policy, NWPA §111(b)(2).

Finally, the DOE's attempt to create a distinction between the *terms* of the Delays Clause (which DOE argues was subject to a 180-day appeal period starting in 1983) and the proper *interpretation* of that provision

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performance standards or dates, they could have been specified in the Act. (Emphasis added).

[13]Also, it may again be noted that the initial 1994 petitions to the Court filed by State and Utility Petitioners were met by a Motion to Dismiss by DOE which urged that the Petitioners were too early, and that no action was ripe for review until DOE issued its Final Interpretation.

(which DOE claims is still subject to adjudication but only in the Court of Federal Claims) lacks merit. Pet.-23-24. The terms of a statute (or regulation) often are reviewed and considered in light of the underlying agency's interpretation thereof. In fact, this is part of the two-step statutory analysis required by *Chevron USA, Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843; (1984), as properly utilized by the court in *Indiana Michigan* in reversing DOE's Final Interpretation. The error of DOE's claimed distinction is also underscored by the reliance all parties placed on DOE's 10-plus years of interpretations of, and commitment to, the January 31, 1998 statutory deadline. Also, there is NWPA §119(c) itself which would still authorize the State Respondents' petition leading to *Indiana Michigan* because it was filed within 180 days of becoming aware of DOE's reversal of over 10 years of policy and interpretation.

In any event, it is too late to present this argument. DOE should have made this argument below and having failed to should not be permitted to do so now. *Zobrest v Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

VI. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED, NOT FOR THE REASONS SET FORTH IN DOE'S PETITION, BUT RATHER FOR THE REASONS SET FORTH IN THE PETITION FILED BY STATE RESPONDENTS IN *STATE OF MICHIGAN, ET AL. v. UNITED STATES DEP'T OF ENERGY, ET AL.*, NO. 98-225.

DOE contends that the court of appeals' decision below intrudes on the jurisdiction of the Court of Federal Claims in that it has "pretermitted the orderly disposition of contract review." Pet.15. DOE further contends that review by this Court is warranted to restore the proper division of jurisdiction between the various federal courts so as to prevent disruption of an important national program. Pet. 15.

State Respondents agree that this is an important national program and further that review by this Court is warranted, *but not* for the reasons advanced by DOE. The court of appeals had the jurisdiction to issue its Mandamus in *Northern States* to enforce the NWPA and to preserve the integrity of its prior, unappealed decision in *Indiana Michigan*. As a review of the facts underlying *Northern States* plainly indicates, the court of appeals was acting to prevent *DOE's disruption* of this important national program.

The court of appeals, however, did not go far enough as there presently is no binding or enforceable deadline for DOE to begin accepting SNF. Furthermore, in the face of continued resistance by the DOE, State Respondents are without a means to obtain

court-ordered action to secure DOE's performance of its duties under the NWPA.

The January 31, 1998 deadline in NWPA §302(a)(5)(B) for DOE to begin taking SNF was a critical component of the NWPA[14] and the court of appeals' failure to take steps to enforce that deadline warrants this Court's review. Furthermore, by framing the issue as involving a contract dispute DOE has sought to pit one federal court against another, even though this litigation was commenced by State and Utility Respondents to enforce statutory duties placed upon DOE by the NWPA and has never involved contract actions for damages. The real issue is DOE's failure to perform its unconditional obligation, under NWPA §302(a)(5)(B), to take SNF beginning not later than January 31, 1998.

A conflict does exist and it is *not* between two different federal courts. Rather, it is within the Court of Appeals for the District of Columbia itself.[15] This is

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[14]The essential elements embodied in the bill of the disposal program include: "Commitment to a waste disposal technology ..., Ultimate federal responsibility ... Total financial support ... A clear 'roadmap' of regulatory requirements ... *A legislated schedule for Federal decisions and actions for repository development*" ..., H.R. Rep. No. 491, 97th Cong., 2nd Sess., pt. 1, at 30 (1982), reprinted in 1982 U.S.C.C.A.N. at 3796 (emphasis added).

[15]The inconsistency between the court of appeals' published decisions in Indiana *Michigan* and *Northern States* and its unpublished May 5, 1998 rehearing order was acknowledged even by the DOE in its brief in opposition in 98-225:

> [Petitioners] argue (see Pet. 12-17) that the court of appeals' order denying the petitions for rehearing and

because the decisions in *Indiana Michigan* and *Northern States* clearly decide that DOE's unconditional obligation is a statutory one. However, the court of appeals' May 5, 1998 order makes the remarkable finding that while Congress created an *unconditional* obligation for DOE to take SNF, Congress did not require performance of that obligation. The court of appeals' May 5, 1998 order violates the fundamental purpose of the NWPA, expunges any trace of an enforceable deadline, trivializes the importance of the Congressional command, and constitutes an abdication of the court of appeals' review function under the NWPA §119.

Congress meant what it said when it created the unconditional obligation that DOE was required to take SNF by January 31, 1998. Any interpretation to the contrary defies the plain language and defeats the overriding purpose of NWPA §302(a)(5)(B). It stands the NWPA on its head by discarding the January 31, 1998 deadline for taking SNF, which was not only the *quid pro quo* of the NWPA's statutory bargain, but the key to the success of the waste disposal program envisioned by Congress[16] since the federal

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motions to enforce the mandate (Pet. App. 17a-21a) is inconsistent with language in the court's prior opinions both in this case and in *Indiana Michigan*. We agree with petitioners that some language in those opinions suggests that DOE's duty to commence SNF disposal by January 31, 1998, is statutory rather than contractual in nature.

[16] "Although there is not unanimous agreement on all aspects of the nuclear waste management program, there is a solid consensus on major elements of the federal program, *and on the need for legislation to solidify a program and keep it on track.*" H.R. Rep. No.

government's inaction was the major failing for thirty years prior to the NWPA's enactment.[17] In the NWPA, Congress told DOE it had 16 years to get ready to begin taking the SNF. Sixteen years later, the DOE no longer has an enforceable or binding timetable to begin the acceptance of SNF from domestic nuclear power plants.

Unless this Court acts, the nation will be back where it was in the 1960's and 1970's. The only difference is that the ratepayers have paid billions of dollars and will continue to pay billions of additional dollars for nothing more than DOE's promise to take SNF. Thus, the *disruption* to the scheme established by Congress is due to the DOE itself and its pattern of conduct to not only avoid its duties under the NWPA, but also to avoid any liability for its failures to act. The court of appeals' determination in its May 5, 1998 order that Congress intended this nation's electric ratepayers to fund payments to the DOE, up to a projected total of more than $30 billion, in exchange for the minor ministerial act of DOE placing a few words in a contract is itself an absurd interpretation. For that reason, the State Respondents filed their petition in *State of Michigan, et al. v United States Dep't of Energy, et al.*, No. 98-225 and it is that petition, and not the DOE's petition here, that should be granted.

491, 97th Cong., 2nd Sess., pt. 1 at 29 (1982), reprinted in 1982 U.S.C. C. A N. at 3795 (emphasis added).

[17] "The failure of the government to provide a permanent waste disposal facility during more than 30 years of federal nuclear activities is unmitigated." H.R. Rep. No. 491, 97th Cong., 2nd Sess., pt. 1 at 28 (1982), reprinted in 1982 U.S.C.C.A.N. at 3794.

CONCLUSION

The DOE's petition for writ of certiorari should be denied and the State Respondents' petition for writ of certiorari in No. 98-225 should be granted.

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